Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WASHINGTON HOSPITAL CENTER

and

AETNA CASUALTY AND SURETY CO.
(now known as TRAVELERS),

Petitioners,

v.

FLORENCE SNOWDEN

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE BENEFITS REVIEW BOARD HAD JURISDICTION TO REVIEW A §18(A) SUPPLEMENTARY COMPENSATION ORDER WHEN IT WAS THE FIRST AGENCY ORDER TO ANNOUNCE THE METHOD USED TO CALCULATE §10(F) ANNUAL ADJUSTMENTS.

2. WHETHER THE BRANDT/ HOLLIDAY METHOD OF CALCULATING §10(F) ANNUAL ADJUSTMENTS IS CONTRARY TO THE STATUTE AND ALSO VOID IN THE D.C. CIRCUIT BY THE TERMS OF THE BRANDT DECISION.

PARTIES TO PROCEEDING

The names of all the parties appear on the cover.

CORPORATE DISCLOSURE STATEMENT

Petitioners state, pursuant to Rule 29.6 of this Court, that Washington Hospital Center is wholly owned by Medlantic Healthcare Group, part of Medstar Health, and that Travelers, the successor corporation to Aetna Casualty & Surety Company, is a wholly owned subsidiary of Citigroup.

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Snowden v. Washington Hospital Center, BRB No. 95-2125 (Dec. 9, 1996) (unpublished).

Snowden v. Washington Hospital Center, Case File No. 40-134355 (C. Green, Assoc. Dir., OWCP Oct. 6, 1998) (Supp. Comp. Order).

Snowden v. Washington Hospital Center, BRB No. 99-0245 (Nov. 15, 1999)(unpublished), *aff'd on reconsideration*, Snowden v. Washington Hospital Center, BRB No. 99-0245 (June 30, 2000)(unpublished).

Snowden v. Director, OWCP, 253 F.3d 725, (D.C. Cir., June 19, 2001).

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is from a judgment entered by the United States Court of Appeals for the District of Columbia Circuit on June 19, 2001. Petitions for Panel Rehearing and for Rehearing En Banc were timely filed on July 27, 2001 and were denied by orders of the United States Court of Appeals for the District of Columbia Circuit on August 27, 2001. This Petition for Writ of Certiorari is timely filed within ninety days of those orders. The basis of this Court's jurisdiction is 28 U.S.C. §2101(c).

STATUTES

The pertinent texts of the specific statutory sections cited in this Petition are reproduced in the attached Addendum.

Federal Statutes:

33 U.S.C. §901 et seq (1982)
33 U.S.C. §908(f)
33 U.S.C. § 910(f)
33 U.S.C. §914(f)
33 U.S.C. §918(a)
33 U.S.C. §921(a)
33 U.S.C. §921(b)(3)
33 U.S.C. §921(c)
33 U.S.C. §922

District of Columbia Statutes:

36 D.C. Code §501-502 (1973)
36 D.C. Code §301 et seq. (1979)

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND FACTS

Florence Snowden suffered a workplace injury in the District of Columbia in 1978. Her claim is covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (1982) as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973).[1]

Snowden was voluntarily paid temporary benefits. On March 18, 1992, after a hearing, an Administrative Law Judge of the Department of Labor found her entitled to permanent total benefits as of December 18, 1990. Snowden v. Washington Hospital Center, 88-DCW-0086 (ALJ Rippey, March 18, 1992). The award "includ[ed] periodic increases", a reference to the annual adjustments provided by §10(f) of the Act. 33 U.S.C. §910(f). No calculation method was mentioned. The ALJ also awarded second injury Special Fund relief. 33 USC §908(f). This decision was appealed to the BRB and was affirmed as to the permanent total award. Snowden v. Washington Hospital Center, BRB Nos. 92-1453 and 92 1453A (June 28, 1994) unpublished).

Litigation continued on §8(f) for three years, during which time Snowden's benefits were paid by the Special Fund. The §8(f) award was ultimately reversed by the BRB in December 1996. Snowden v. Washington Hospital

[1] The District of Columbia Workers Compensation Act cited above has been repealed and replaced by the D.C. Worker's Compensation Act of 1979, D.C. Code §36-301 et seq., which established a local workers compensation program administered by the District covering injuries occurring on or after July 26, 1982. While the legal issues presented in the instant case have limited precedential value in the D.C. Circuit, since they only apply to claims adjudicated under the old DC/LHWCA statute, the issues are of continuing relevance to the administration of the Longshore Act and its extensions.

Center, BRB No. 95-2125 (Dec. 9, 1996) (unpublished). Washington Hospital Center/Aetna, hereinafter referred to as Employer/Insurer, then reassumed the payment of ongoing benefits and reimbursed the Director, OWCP, USDOL, for benefits paid to Claimant by the Fund.

In early 1998, Aetna was contacted by OWCP regarding the §10(f) annual adjustment due in October 1997. This was the first annual adjustment to be assessed since Employer/Insurer re-assumed payments. Employer/Insurer questioned the calculation method used by OWCP, then took the only recourse available under the Act to challenge the adjustment. Employer/Insurer reduced Claimant's benefits, and requested that an order be issued specifying the method OWCP used to calculate the §10(f) adjustment, so an appeal could be taken to the BRB. Ultimately, OWCP issued a Supplementary Compensation Order pursuant to 33 U.S.C. §918(a), which stated that Aetna was required to make annual "cost of living adjustments" calculated "in accordance with the Holliday Decision." Employer/Insurer was ordered to pay the arrearage and a penalty pursuant to §914(f) of the LHWCA. 33 U.S.C. §914(f).

Employer/Insurer appealed this Supplementary Compensation Order to the BRB. In an unpublished Decision, Snowden v. Washington Hospital Center, BRB No. 99-0245 (Nov. 15, 1999)(unpublished) and an unpublished Decision on Reconsideration, Snowden v. Washington Hospital Center, BRB No. 99-0245 (June 30, 2000)(unpublished) the BRB held that jurisdiction was proper pursuant to 33 U.S.C. §921(b)(3) because the October 16, 1998 Supplementary Compensation Order was an original adjudication of the Brandt/Holliday issue. This calculation method had not previously been reduced to a formal compensation order and, therefore, this was the first opportunity Employer/Insurer had to raise the issue.

The BRB then concluded that the calculation used by OWCP, the Holliday/Brandt methodology, was not the law

in D.C. Act cases. Therefore, the Supplementary Order of October 16, 1998 was reversed.

Claimant appealed the BRB's Decision to the United States Court of Appeals for the District of Columbia Circuit pursuant to the review authority provided in 33 U.S.C. §921(c). Claimant raised the Board's jurisdiction to review the Supplementary Order, as well as the §10(f) calculation. On June 19, 2001, a panel of that court held the BRB had no jurisdiction. Snowden v. Director, OWCP, 253 F.3d 725, (D.C. Cir., June 19, 2001). It did not reach the substantive question of the §10(f) calculation. Aetna's petitions for panel rehearing or rehearing en banc were denied.

THE ARGUMENT

1. WHETHER THE BENEFITS REVIEW BOARD HAD JURISDICTION TO REVIEW A §18(A) SUPPLEMENTARY COMPENSATION ORDER WHEN IT WAS THE FIRST AGENCY ORDER TO ANNOUNCE THE METHOD USED TO CALCULATE §10(F) ANNUAL ADJUSTMENTS.

The decision of the panel of the D.C. Circuit held that since this case arose subsequent to a §18(a) Supplementary Compensation Order, 33 U.S.C. §918(a), the Benefits Review Board (BRB) did not have jurisdiction to review it pursuant to §921(b)(3).

The D.C. Circuit, citing decisions from two other circuits, Providence Washington Ins. Co. v. Director, OWCP, 765 F.2d 1381 (9th Cir. 1985) and Tidelands Marine Services v. Patterson, 719 F.2d 126 (5th Cir. 1983), held that the Longshore Act provides two separate avenues of appeal. Section 21(b)(3) provides for a general grant of review

jurisdiction to the BRB to hear and determine appeals raising a substantial question of law or fact taken from decisions within 30 days, 33 USC §921(b)(3), while orders for the collection of defaulted payments within the meaning of §18(a) are to be brought in the district court.

This is a convenient, easily administered distinction. And in cases such as Tidelands and Patterson, where the issue is simple failure to pay or timely pay compensation, it is consistent with the statutory language and the procedural scheme established by Congress. However, in the instant case, automatic application of this procedural test works an injustice and undermines Congressional intent. The statute clearly states that "substantial questions of law or fact" are to be reviewed, in the first instance, by the BRB pursuant to §21(b)(3). The instant case presents such a substantial question. But because the ambiguity emerged after the initial appeal period had run, the only means available to Employer/Carrier to effect judicial review was to default. In such cases, review jurisdiction must lie with the BRB.

In Tidelands, the employer's check for a lump sum compromise settlement payment was received by the claimant 18 days late, triggering a penalty. 33 U.S.C. §914(f). In Providence, the employer failed to initiate payment of benefits or to obtain a stay of payments after an ALJ's Compensation Order was issued and while it pursued a motion for reconsideration and an appeal. This also triggered the non-discretionary §14(f) penalty. In both of these cases the claimant ultimately obtained a Supplementary Order of Default. The instant case is entirely distinguishable from Providence and Tidelands in that it arises out of a late emerging genuine dispute regarding the calculation of the §10(f) annual adjustments, a "question of law or fact" that had never been explicitly addressed in a prior compensation order.

The Fifth Circuit considered a similar issue in Bray v. Director, OWCP, 664 F.2d 1045 (5th Cir. 1981) and held,

contrary to Tidelands, that in such limited circumstances the BRB has the authority to review an issue presented in a §18(a) order.

In Bray, a 1969 compensation order awarded benefits. It was not appealed, and the parties stipulated that it became final. In 1979, benefits paid reached the pre-1972 Act aggregate maximum of $24,000.00 and the carriers announced their intention to discontinue payments. Claimant requested a formal hearing. OWCP issued an order in 1980 that the carriers' liabilities had been discharged. Claimant appealed to the BRB. Without reaching the merits, the Board dismissed the appeal, citing §18(a), and reasoning that it was without jurisdiction since "[q]uestions concerning the enforcement of a compensation order and inferentially an analysis of the language in the order would appear to be the province of the federal district court in which (sic) the injury occurred."

The Fifth Circuit reversed the BRB stating:

> The proceedings instituted in 1979 are not a direct appeal of the 1969 order, but are properly styled an application for a supplementary order declaring a default in the payment of compensation under §18(a) of the LHWCA, 33 U.S.C. §918(a). [fn omitted] It is reasonable to suppose that the most common issue in a §18(a) proceeding, for which it was clearly designed, is an employer's failure to pay benefits where the compensation order clearly provides for them. The unusual case may arise, however, where an order is ambiguous or unclear, or uncertainty arises in its application, which was not reasonably apparent at the time of the entry of the order. Such a deficiency is distinct from an

> error of fact or law, which must be asserted within 30 days after filing of a compensation order. 33 U.S.C. §921(a). Where the order does not explicitly answer a question which emerges during the period of payment, there must be some means by which to address the rights of the parties. A §18(a) proceeding is appropriate for this purpose.

Bray at 1047. The Court then examined the pre-1972 amendment procedures under the Longshore Act and concluded that the new procedures established by the 1972 amendments did not take away the right to the review of deficiencies in compensation orders merely because they are asserted pursuant to §18(a).

Neither the Fifth Circuit's opinion in Tidelands nor the Ninth Circuit's opinion in Providence cite, discuss or distinguish Bray.

The instant case is also one of these "uncommon" and "unusual" cases presenting an issue which arose after the time for appealing the ALJ's decision had run. The calculation of annual adjustments was never addressed in any compensation order in this case. Employer/Insurer attempted, unsuccessfully, to raise the issue with OWCP. At that point, the only means to obtain review of the issue was to stop payments and force OWCP to issue an order on §10(f).

The underlying controversy is the interpretation of a "substantial question of law or fact", as contemplated by §21(b)(3), and not merely "a default by the employer in the payment of compensation due under any award", as described in §18(a). The Longshore Act should not be interpreted so simplistically and absolutely as to prevent substantive review of such disputes by the BRB, the forum created by Congress for that very purpose.

A. Employer/Insurer Did Not Have Timely Notice That OWCP Was Applying Brandt/Holliday.

The ALJ's March 1992 Compensation Order awarded permanent total benefits to claimant backdated to commence on December 1990. The Order acknowledged that §10(f) periodic adjustments would be due but it was silent as to the calculation method.

The only document in the record which mentions that the Brandt/Holliday interpretation of §10(f) was being applied in this case is an *undated* OWCP calculation sheet, which was an attachment to an *internal* OWCP letter dated Monday, April 27, 1992. This was 31 days after the ALJ's Compensation Order was filed and was the last day for filing an appeal with the BRB. There is no record evidence that this calculation sheet was ever served on Employer/Insurer by OWCP. And even if the information in the calculation sheet had somehow been communicated to Employer/Insurer, it was erroneous, insufficient and misleading as to the law.

The calculation sheet makes bare references, without citations, to "Holiday(sic) -Rate" and "Holiday(sic) Decision", the latter buried in a footnote. By this time the Fifth Circuit's Decision in Holliday v. Todd Shipyards Corp., 654 F.2d 415 (5th Cir. 1981) was a nullity since it had been reversed two years earlier. Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033 (5th Cir. 1990). The calculation sheet does not explain why it follows this empty precedent. Furthermore, the calculation sheet does not mention the D.C. Circuit's decision in Brandt v. Stidham Tire Co., 785 F.2d 329 (D.C. Cir. 1986), the only relevant case law out of the D.C. Circuit.[2]

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[2] Brandt's status as controlling precedent in the D.C. Circuit is also disputed in this case. The decision includes unusual language that

Neither Snowden nor OWCP have established that the information conveyed in the OWCP calculation sheet was communicated to Employer/Insurer within the statutory appeal period, if at all. It cannot be deemed part of the ALJ's Decision and Order. Therefore, the ALJ's decision is silent on the methodology for calculating §10(f) adjustments.

As stated in Bray, this is the "unusual case...where an order is ambiguous or unclear, or uncertainty arises in its application, which was not reasonably apparent at the time of the entry of the order." Bray at 1047. Employer/Insurer could not have timely appealed the §10(f) calculation. The only recourse was to stop payments and request that an order be issued. Snowden responded by initiating a §18(a) proceeding. The Fifth Circuit has held that, in such cases, the statute permits the Board to review the issues raised by the legal deficiency of the underlying order pursuant to §21(b)(3).

B. The D.C. Circuit's Statement That Employer/Insurer Paid For Years Without Challenging OWCP's Calculations Is Inaccurate.

The D.C. Circuit acknowledged that the ALJ's decision was silent as to the methodology for calculating the adjustments, but holds that it was "implicit in light of Brandt/Holliday and the fact that for years Aetna paid..." compensation including the higher Brandt/Holliday catch-up

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suggests the holding was dependent on the continued viability of Holliday. At the first opportunity, the BRB adopted this interpretation and held that the Brandt/Holliday rule for calculating §10(f) adjustments no longer applies in cases arising in the D.C. Circuit. Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (May 19, 1998). The question was presented to the D.C. Circuit in the instant case, but the panel refused to reach the issue since it found no jurisdiction.

adjustment. [3] An examination of the procedural history and the state of the case law at the time of the ALJ's 1992 decision paints a significantly different picture. In fact, Employer/Insurer paid ongoing benefits for only about nine months in 1992 and then again for about 14 months in 1997-98, the period when the instant controversy arose.

Snowden was paid temporary total benefits by Employer/Insurer up to the time of the ALJ's 1992 decision. The ALJ set a date for permanency 15 months before the date of his decision. The ALJ also awarded §8(f) second injury Special Fund relief, so that Employer/Insurer was only liable for the first 104 weeks of Snowden's permanent total benefits. After that initial limited period, all future benefits were to be paid by the Special Fund maintained by OWCP.

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[3] Snowden argued below that these voluntary payments amounted to an acquiescence in the calculation which had the finality and legal effect of an order and which cannot now be reopened or challenged. She also stated that the Employer/Insurer's appeal is an attempt to "collaterally attack an underlying compensation award through an appeal of a Section 14(f) penalty."

The general rule under the LHWCA is that final adjudications cannot be reopened except under the very limited circumstances allowed by Section 22 of the Act. 33 U.S.C. § 922. The BRB held that §22 did not bar this appeal since the issue was never adjudicated until the Associate Director issued his Supplementary Compensation Order on October 16, 1998.

Similarly, the appeal is not barred by the doctrines of law of the case, res judicata (claim preclusion) or collateral estoppel (issue preclusion) since those doctrines also depend on a prior adjudication before they can act as a bar. See generally, Nasem v. Brown, 595 F.2d 801 (D.C. Cir. 1979) (party must have had adequate opportunity to litigate issue in administrative proceeding before collateral estoppel doctrine will be applied); Simms v. Valley Line Co., 709 F.2d 409, 15 BRBS 178(CRT)(5th Cir. 1983) (res judicata and collateral estoppel apply only after a final adjudication); Stark v. Bethlehem Steel Corp., 15 BRBS 288 (1983) (Ramsey, dissenting in part) (law of the case applies to issues decided in a previous adjudication of the same case).

Therefore, at the time of the ALJ's Compensation Order in March of 1992, the Employer/Insurer's liability was: (1) some additional amounts for the past period from December 1990 to March 1992, (2) ongoing permanent total benefits from April to December 1992, and then (3) no further liability because the Special Fund would take over all remaining payments pursuant to §8(f).

The record does not reveal the date when Employer/Insurer made these adjusted payments, who performed the calculations, and what explanation accompanied those calculations. However, the internal OWCP letter of April 27, 1992 and its accompanying calculation sheet referencing Holliday could not have been sufficient timely notice to Employer/Insurer for purposes of filing a §21(b)(3) appeal.

With incomplete information, and the belief that its liability for benefits would completely terminate in December, at some unknown date Employer/Insurer paid. Years later, in December of 1996 when the §8(f) second injury Special Fund relief was reversed by the BRB, Employer/Insurer re-assumed payment of Snowden's compensation benefits. In early 1998, shortly after the Employer/Insurer's first §10(f) annual adjustment to benefits became due in October 1997, OWCP noticed a discrepancy in Employer/Insurer's adjustment calculation and requested clarification. When subsequent communications revealed the parties were using different methodologies and that these differences could not be resolved, Employer/Insurer proceeded with the only recourse available to force judicial review – a reduction of benefits.

Similarly, the D.C. Circuit's implication that Employer/Insurer's actions were simply motivated by the "change in law" created by the BRB's decision in Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (May 19, 1998) is inaccurate. The foregoing administrative history

demonstrates that the controversy arose well before Bailey with the annual adjustment computation of October of 1997.

2. WHETHER THE BRANDT/HOLLIDAY METHOD OF CALCULATING §10(F) ANNUAL ADJUSTMENTS IS CONTRARY TO THE STATUTE AND ALSO VOID IN THE D.C. CIRCUIT BY THE TERMS OF THE BRANDT DECISION.

A) The Fifth Circuit's Holliday method of calculating Section 10(f) adjustments was contrary to the statute and has been overruled by the Fifth Circuit sitting en banc.

Section 10(f) of the LHWCA provides for annual cost of living adjustments to permanent total disability benefits. These increases vary each year and are calculated as a percentage of the previous year's compensation rate. The percentage rate applied is the percentage rise each year in the national average weekly wage. Increases go into effect on October 1 of each year.

The past practice of OWCP, based on the language of the statute, was as follows: When a claimant became permanently totally disabled he continued to be paid at the same rate as if he were temporarily totally disabled until the next October 1st. On that date his benefits were adjusted upward by that year's set percentage. On the next October 1st, benefits were increased again, and so on. The increases compound annually so that, as the years passed, a larger and larger amount of a claimant's check was actually made up of adjustments rather than the base compensation rate.

In 1981, the 5th Circuit issued a decision drastically altering this simple system. In Holliday v. Todd Shipyards Corp., 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), the court

held that a claimant's first payment of permanent total disability benefits should include a compounding of all the annual adjustments applicable in the years since the claimant first became temporarily totally disabled. In effect, Holliday meant that claimants, like Snowden, who had received flat temporary total benefits for many years, were entitled to an immediate increase in their compensation rate when they started to receive permanent total benefits. This increase would vary for each claimant depending on the rates applied during their temporary total years. Of course, all future increases in benefits compounded or built upon this adjusted starting base.

The Holliday decision ignored the plain language of the statute and was not well reasoned. Nevertheless, it threw the administration of the Act into controversy, unleashed a storm of litigation and created a split in the Circuits.

In 1986, the D.C. Circuit was faced with the interpretation of §10(f). It did not examine the merits of the Holliday rationale. Disturbed that claimants in different circuits were receiving disparate benefits, the D.C. Circuit decided to follow the 5th Circuit's decision in Holliday, "at least until the precedent is overruled in the Fifth Circuit, or the Director publicly announces that, prospectively, he will seek to apply this current interpretation evenhandedly to all similarly disabled claimants in all circuits." Brandt v. Stidham Tire Co., 785 F.2d 329 at 332, 18 BRBS 73 at 78 (CRT).

In 1990, the 5th Circuit, sitting en banc, reversed Holliday. Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990) (en banc).

B) The D.C. Circuit's Brandt decision is contrary to the statute and had also expired by its own language at the time of the compensation order in this case.

After Phillips, the BRB had an opportunity to consider §10(f) in a case arising in the D.C. Circuit. The Board held that Brandt had been vacated by its own terms and was no longer the law. Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (May 19, 1998). Unfortunately, the Bailey decision was not appealed and was never reviewed by the D.C. Circuit.

The language of the statute is very clear with regard to §10(f). The only adjustments allowed are the annual increases to be assessed on October 1st of each year on awards of permanent total disability or death benefits. The statute provides:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by **the lesser of –**
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or
> (2) **five per centum**.

33 U.S.C. §910(f) (1984 amendments added language in bold which applies prospectively to adjustments beginning October 1, 1984).

Indeed, Congress had previously rejected a version of the statute providing adjustments to all compensation, including temporary total. See S. 2318, 92d Cong., 2d Sess. 311 (1971) cited in Phillips, at 1035.

The statute is clear on its face. Annual adjustments are assessed only on permanent total disability compensation or on death benefits. They are assessed prospectively only. There is no provision for intervening increases for periods of temporary total disability to be credited to a claimant when she becomes permanently totally disabled. The legislative history also supports this position.

The D.C. Circuit declined to reach the substantive merits of this issue, holding that the BRB did not have jurisdiction. This Court should remand this case to the D.C. Circuit to address the §10(f) issue, specifically to clarify their position on the statutory authority for the Brandt calculation of §10(f) adjustments. In doing so, this Court will eliminate the continuing uncertainty and disparity in the administration of benefits across the circuits since Holliday was overruled.

CONCLUSION

The D.C. Circuit's decision to vacate the BRB's review of the substantive issue in this case on jurisdictional grounds should be reversed. The Fifth Circuit has held to the contrary, and the D.C. Circuit's rigid interpretation is contrary to the language and legislative intent expressed in §21(b)(3).

This case should be remanded to the D.C. Circuit for a ruling on the issue of §10(f) adjustments. Should the D.C. Circuit follow the Fifth Circuit and invalidate Brandt/Holliday, it should also address the curious limiting language in Brandt and determine whether that case was ever valid precedent in the D.C. Circuit after Phillips.

The D.C. Circuit should then proceed to review the propriety of the relief granted Employer/Insurer by the BRB.

Respectfully Submitted,

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